IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, *et al.*,
Appellants,

versus

BOB BULLOCK, Secretary of State of Texas

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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versus

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TEXAS NEW PARTY, TEXAS SOCIALIST WORKERS PARTY, *et al.*,

Appellants,

versus

PRESTON SMITH, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Appellants, consisting of various minority political parties, their candidates for public office, individuals seeking office as independent candidates, and qualified Texas electors desiring to vote for these candidates, appeal from a final order entered on September 15, 1972 by a Three-Judge Federal District Court, which dismissed four consolidated class actions

seeking declaratory and injunctive relief against certain provisions of the Texas Election Code and related Texas election laws. This jurisdictional statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal, which presents substantial Federal questions not previously resolved by the Court.

The Opinion Below

On September 15, 1972 a Three-Judge Federal District Court convened in the Western District of Texas, San Antonio Division, entered a Memorandum Opinion and Order dismissing each of the four consolidated complaints and denying all relief requested by the Plaintiffs. No other preliminary or interim orders have been entered. As yet unpublished, the District Court's opinion is contained in Appendix A at page 17.

Jurisdiction

The present suits were instituted under the Civil Rights Act of 1871, 42 U.S.C. § 1981 and § 1983, the Voting Rights Act of 1965, 42 U.S.C. § 1971, and the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Because each complaint sought an injunction against Texas statutes of State-wide application, and because each action involved essentially identical issues and claims for basically the same relief, the Chief Judge of the United States Court of Appeals for the Fifth Circuit convened a Three-Judge District Court as required by 28 U.S.C. § 2281 and ordered the four cases consolidated for trial. The District Court's final order denying all declaratory and injunctive relief is contained in Appendix B at page 37. Timely notices of appeal were thereafter filed and are contained in Appendix C at page 39. Appeal to this Honorable Court is based on 28 U.S.C. § 1253.

Among numerous decisions sustaining the jurisdiction of this Court to consider a final order by a Three-Judge Federal District Court granting or denying an injunction are *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and companion cases, *Mitchell v. Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970) and *Goldstein v. Cox*, 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970).

Statutes Involved

The challenged provisions of the Texas Election Code, Tex. Rev. Civ. Stat. Ann. Arts. 13.12, 13.45, 13.47 and 13.50 (1967), as amended [hereinafter cited as Texas Election Code or merely by article number] and the McKool-Stroud Primary Financing Law of 1972, Tex. Rev. Civ. Stat. Ann. art. 13.08c-1 are set out in Appendix D at page 44.

Questions Presented

1. Whether the totality of the general election ballot certification requirements imposed on minority parties and independent candidates by the Texas Election Code, including provisions forcing such parties and candidates to obtain the *notarized* signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty, Due Process and Equal Protection guaranteed by the First and Fourteenth Amendments.

2. Whether a State election law prohibiting minority parties and independent candidates from circulating nominating petitions for the general election until after the major party primary elections, and further providing that a voter who has previously participated in a major party's primary election or nominating convention is thereafter ineligible to sign a nominating petition during the same election year, abridges the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

3. Whether a State election law financing major party primary elections but denying financial assistance to minority parties required by State law to incur substantial expense in placing their candidates' names on the general election ballot is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

4. Whether a State election law permitting absentee bal-

loting for a major party candidate but precluding an absentee vote for a minority party or independent candidate is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Statement of the Case

Initially, four separate complaints were filed seeking to enjoin the Secretary of State of Texas from enforcing certain allegedly unconstitutional provisions of the Texas Election Code and related Texas laws.[1] By order of Chief Judge John R. Brown the cases were consolidated for hearing and determination and a single Memorandum Opinion and Order was entered dismissing all complaints of all parties. Pursuant to Rule 15(3) of the Rules of this Court, a single jurisdictional statement is filed on behalf of all appellants in all suits.

In 1968 the Presidential nominee of the American Party of Texas received in excess of 586,000 votes in this State

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[1] Raza Unida Party filed suit in April 1972 in the United States District Court for the Western District of Texas, San Antonio Division, seeking an injunction prohibiting the Secretary of State of the State of Texas from invoking Art. 13.45 (2) of the Texas Election Code and directing the Secretary of State to permit absentee voting by La Raza Unida Party. The American Party of Texas filed suit in the United States District Court for the Western District of Texas, Midland-Odessa Division, in May 1972, seeking a Temporary Restraining Order prohibiting the Secretary of State of the State of Texas from invoking Art. 13.45(2) of the Texas Election Code and seeking a Three-Judge Federal Court to consider the constitutionality of that enactment and the McKool-Stroud Primary Financing Law of 1972. Laural N. Dun, et al, filed suit in the United States District Court for the Western District of Texas, Waco Division, in June 1972, seeking a hearing before a Three-Judge District Court and seeking a Temporary Restraining Order against Bob Bullock, et al, as officials of the election enjoining them from enforcing the allegedly illegal and unconstitutional provisions of Art. 13.47a, 13.50, 13.51, 13.52, 13.53, 6.06a, 13.09b, 13.11a and 13.11 and requesting a declaratory judgment that the Election Code complained of is void on its face, and affirmatively seeking an Order that Plaintiffs' names be printed on the General Election ballot. The Texas New Party and Texas Socialist Workers Party, et al, filed suit in the United States District Court for the Southern District of Texas, Houston Division, in July 1972, seeking an injunction against the Secretary of State from enforcing the June 1972 deadline for the submission of sworn petitions for nomination and seeking a Temporary Restraining Order prohibiting the Secretary of State of the State of Texas from invoking Texas Election Code Art. 13.45(2), 1.05, 13.12(2), 13.57a (1) and 13.11a, and further seeking declaration of the Court that Art. 13.45(2), 13.11a, 1.05, 6.02, 13.12(2), 13.47a(1) of the Texas Election Code and Art. 4, Secs. 4 and 16 of the Constitution of the State of Texas are unconstitutional in their entirety and seeking to enjoin the exclusion of the nominees of the Texas New Party of Texas and the Texas Socialist Workers Party State conventions from the General Election ballot.

(approximately 25% of the total cast) in the general election However, because the American Party did not desire to nominate a *gubernatorial* candidate in the State's 1970 General Election, it was not allowed to have its nominees for any office placed on the 1972 General Election Ballot unless and until it complied with certain onerous, exceedingly expensive and allegedly unconstitutional requirements of Texas Election Code Article 13.45(2). These additional burdens and expenses, as are more fully described hereinafter, were not imposed on either the Democratic or the Republican parties simply because they had proposed gubernatorial candidates in 1970 who had polled in excess of 200,000 votes each. When it became apparent that the American Party, partially due to certain tragic national events, would be unable to comply fully with the cumbersome requirements of Article 13.45(2) within the extremely limited time span allowed, a complaint was filed in the Federal District Court for the Western District of Texas challenging the constitutionality of this and related Texas Election laws and seeking declaratory and injunctive relief.

At about the same time, the Texas New Party and the Texas Socialist Workers Party, realizing that they would probably be denied ballot positions for their Presidential and local candidates because of inability to comply with Article 13.45(2) and, in all events, desiring to avoid the exceedingly cumbersome requirements of that enactment in future elections, filed similar lawsuits in their respective Federal District Courts. Similarly, Laurel Dunn, who desired to run for Congress as an Independent candidate, but who had been unable to comply with the requirements of Texas Election Code Article 13.50, instituted suit on his own behalf and on behalf of all those similarly situated seeking Federal adjudication of the constitutionality of that provision of the Texas Election Code.

The cases were consolidated for hearing and determination by a single Three-Judge Federal District Court constituted pursuant to the provisions of 28 U.S.C. § 2281.

On September 7, 1972 the Three-Judge District Court convened to consider all of the cases which had been filed concerning the Texas Election Code. Each of the political party Plaintiffs challenged the constitutionality of Article 13.45(2) which sets forth the requirements which a new or minority

party must meet in order to have the names of its nominees printed on the General Election Ballot. In Texas, any political party whose candidate for governor in the last preceding election polled at least 200,000 votes nominates candidates for upcoming elections by means of a party primary completely financed by State funds. Plaintiff political parties were not eligible, under Texas law, to nominate by primary election in 1972, nor will the appellants be entitled to conduct primary elections in the next general election. The only alternative means of having the names of its nominees printed on the general election ballot is and will be for these parties to comply with the onerous requirements of Article 13.45 of the Texas Election Code. The burdens imposed by that provision include the following:

(i) Each such party must hold precinct, county, distirct and state nominating conventions on certain dates prescribed by the statute and coinciding with the conventions and primary election day of major political parties.[2]

(ii) In order to have the names of its nominees printed on the General Election ballot, the parties must demonstrate that the number of qualified voters attending such precinct conventions amounted to at least one (1%) percent of the total votes cast for Governor in the last preceding general election. If the number of qualified voters attending the precinct conventions is less than the required one (1%) percent, there must be filed, along with the precinct convention attendance lists, a petition requesting that the names of the parties' nominees be printed on the General Election ballot, signed by a sufficient number of additional qualified voters to make the combined total of at least one (1%) percent of the total votes cast for Governor in the last preceding General Election.

(iii) No person may attend a new or minority party convention *or sign its nominating petition* if he has voted at any primary election or participated in any

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[2] Precinct conventions must be held on the first Saturday in May; County conventions must convene on the second Saturday in May; District conventions must take place on the third Saturday in May; and State conventions are required on the second Saturday in June.

convention of any other political party during that voting year, on pain of criminal sanctions.

(iv) The nominating petition may not be circulated until after the date set for the holding of the major parties' primaries and must be filed in the Secretary of State's office within approximately fifty-five (55) days of that date.[3]

(v) Each person who signs the petition must be administered an oath before a Notary Public at the time he signs the nominating petition.[4]

The Three-Judge District Court determined initially that the fundamental nature of the rights affected demands "exacting scrutiny" of the enactments in question and application of the stringent "compelling state interest" test in determining their constitutionality. Regarding the organizational requirements, the Court found the Texas statute to be "obviously more burdensome than the Georgia scheme upheld in *Jenness*[5] but concluded that on balance the obstacles were justified:

> "Following the *Jenness* command to look to the 'totality' of the state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible."

Regarding the prohibition against circulating nominating petitions before the majority parties' primary elections, the Court determined that this requirement was a legitimate exercise of State authority since allowing advance circulation of

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[3] The petitions must be filed within twenty days after the State convention, which must be held on the second Saturday in June. For the 1972 elections, that translated to June 30 deadline.

[4] "To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: 'I know the contents of the foregoing petition, requesting the names of the nominees of the ..... Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting years I have not voted in any primary election or participated in any convention held by any other political party.'" Art. 13.45(2).

[5] Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 24 (1968).

nominating petitions might preclude an early signer from changing his mind and participating in a majority party's primary election or conventions. This provision was also upheld as a reasonable means of reducing the likelihood "that individual voters would become confused or engage in the party process of more than one party."

The requirement that signatures on nominating petitions be notarized was approved by the Three-Judge District Court "for want of a feasible alternative" to enforce criminal sanctions against participating in the political activities of more than one party in any given election year.

The fifty-five (55) day limitation on obtaining signatures on nominating petitions was justified on grounds that a failure to obtain the required number of signatures within that length of time "indicates that the political party involved lacks political support or initiative." Further, the Court agreed with the State that a cutoff period 120 days before the general election "is necessary in order for the Secretary of State to check the validity of the signatures on the petitions as best he can in sufficient time to allow, not only the printing of the ballot, but any legal contests which might arise."

In this piecemeal approach analyzing each provision separately, the Court did not discuss the impact of the "totality" of these provisions or the effect of their interactions.

In addition to challenges to Article 13.45(2) which were raised by all political party plaintiffs, particular plaintiffs individually raised other challenges to various provisions of the Texas Election Code. The American Party of Texas and the Texas New Party objected to the provisions of Article 13.12 and 13.47(a) which requires all candidates including candidates for minority party nominations, to file a formal declaration of candidacy no later than 6:00 p.m. on the first Monday in February, three months preceding the first primary or precinct convention and nine months before the General Election. The Three-Judge District Court dismissed this complaint by asserting that since Article 13.12 applies to all persons, including majority party candidates, no violation of Equal Protection or Due Process is involved.

Several of the Plaintiffs alleged that the failure of the Texas Election Code to allow absentee ballots to be cast for

minority or independent candidates while permitting absentee balloting for majority party candidates constituted a denial of Equal Protection and Due Process. The Three-Judge District Court held, simply, that "Although the State of Texas does not offer any reasons for lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, legislatures are presumed to have acted constitutionally* * *."

Regarding the constitutionality of the McKool-Stroud Financing Law of 1972, the Court considered certain dictum in this Court's opinion in *Bullock v. Carter*, 405 U.S. 134, to be dispositive of the issue: "We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries." 405 U.S. at 139. The Court did not discuss the concept of Equal Protection leading to the conclusion that a State may subsidize major parties' efforts to obtain ballot recognition while denying such financial assistance to new or minority parties which are required by State law to incur substantial expense in order to have the names of its nominees for public office printed on the General Election ballot.

The Questions Presented are Substantial

The Texas political candidacy restrictions that are challenged in this appeal involve State-imposed nominating procedures that in their impact on minority parties and independent candidates, are almost precisely equidistant between the extremely restrictive Ohio enactments invalidated in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) and the relatively liberal Georgia statutory scheme upheld in *Jenness v. Fortson* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).[6] Aside from the fact that the District Court

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[6] In both *Williams v. Rhodes* and *Jenness v. Fortson* the Court was confronted with State election laws under which minority party and independent candidates for public office, in order to secure a position on the ballot, were required to fulfill requirements materially different from those imposed on the candidates of major political parties. While in *Williams* the Court held that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights amounting to an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment, "393 U.S. at 34, in *Jenness* the Court found that there had been no discrimination, invidious or otherwise, because the State of Georgia had provided "two alternative paths [to candidacy], neither of which can be assumed to be inherently more burdensome than the other." 403 U.S. at 441.

erroneously disregarded the mandate of both *Jenness* and *Williams* to consider the "totality" of the challenged election laws "as a whole," (rather than examining each section of the statute separately and individually), the present appeal provides this Court with an ideal opportunity to address the most significant issue left unanswered in the previous cases — namely, by what specific standard and criteria is the "totality" of a challenged nominating system to be tested for constitutional viability.

In this regard the decisions of lower Federal Courts since *Jenness* have exemplified considerably diverse conceptions of the appropriate analytical criteria. Thus, while almost all decisions agree that the "totality" of a State's alternative path for minority party and independent candidates must be considered in assessing its comparative impact on the candidate's opportunity to compete with major political parties in marshalling electoral support, many of the cases have entailed attempts to resolve the problem by concentrating on one factor or set of factors — for example, the percentage of voter signatures required on nominating petitions — while foregoing altogether any meaningful evaluation of how that particular restriction interacts with all other statutory hurdles impeding access to the ballot. See e.g., *Jones v. Hare*, 440 F.2d 685 (6 Cir., 1971), *cert. denied*, 404 U.S. 911; *Rosario v. Rockefeller*, 458 F.2d 649 (2 Cir., 1971), *cert. granted*, 40 U.S.L.W. 3572, May 30, 1972.

Clearly this pronounced tendency to foresake plenary consideration of the "totality" of the State's statutory restrictions on candidacy and to substitute more or less individualized scrutiny of specific ballot certification requirements (any one of which, when considered singly and in the abstract, may not impose particularly unreasonable or onerous burdens on candidacy) is not in accord with the dictates of *Williams* and *Jenness*. Yet the District Court below as have so many other lower courts, fell into precisely this error by examining each of the manifold Texas restrictions on candidacy without regard to its interrelationship with the others; after concluding that each separate aspect of the Texas system was individually constitutional, the District Court simply asserted, without any real elaboration of its underlying reasoning, that the entirety was constitutional as well. In order for the Federal Courts to undertake any truly meaningful appraisal of State candi-

dacy requirements in the future, it is necessary for this Court to delineate in more detail the relevant considerations appropriate to a consistently rational determination of whether the "totality" of restrictions on minority party and independent candidacy places an impermissibly discriminatory burden on such candidacy. This appeal provides the ideal context for further development of such standards.

Although three of the four questions presented for review are framed in terms of the specific prohibitions on independent and minority candidacy imposed by various provisions of the Texas Election Code, the thrust of Appellants' attack is that all of these restrictions, when considered together and in terms of their total impact on a candidate's opportunity to appear on the ballot, clearly erect impermissibly burdensome, complicated and expensive barriers against minority parties and independent candidates in violation of the Fourteenth Amendment's guarantee of equal protection of the laws.

Under the decisions of this Court distinguishing between the permissible and impermissible methods which a State may employ to accomplish the legitimate objective of insuring that only bona fide candidates are placed on the ballot, this appeal plainly presents substantial Federal questions not previously considered by the Court. Given the fundamental character of the political rights involved and the existence of four sharply defined constitutional issues, the Court should accept the opportunity presented by the facts of these cases to further clarify and define the appropriate constitutional standards governing State candidacy restrictions and "to examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

Moreover, given the multitude of pending cases involving State nominating procedures for minority party and Independent candidates, the Court should take into account the fact that the formulation of authoritative guidelines in the present appeal would not only facilitate appropriate resolution of these problems in the lower courts but would also help to insure that the legitimate political aspirations of national minority candidates are not frustrated by a dilution of their support as the result of their inability to meet Texas's un-

reasonably restrictive requirements as a prerequisite for a place on the General Election ballot. The exclusion of a bona fide national candidate from a ballot position in Texas directly dilutes the quality of the vote for this candidate by limiting his potential electorate. Consequently, this appeal squarely raises issues that are national in scope, since the exclusion of a national candidate from the ballot in one of the country's largest States adversely affects his strength nationwide.

Plainly the Texas system is constitutionally infirm in at least four material respects. First, the totality of the restrictions which Texas imposes on minority party and Independent candidates is substantially greater than the burdens of the Georgia statutory scheme approved in *Jenness v. Fortson*. Unlike Georgia, Texas imposes on minority political parties "the Procrustean requirement" of establishing elaborate party organizational machinery entailing compliance with a labyrinth of details which commence fourteen months before the General Election and continue through precinct, county, district and state conventions and reporting relative thereto. Unlike Georgia, Texas limits the available pool of signatures for nominating petitions to those individuals who have not previously participated in an established party's primary election or nominating convention. Unlike Georgia, which allows six months for securing signatures on nominating petitions, Texas limits the time within which signatures must be collected to approximately 55 days. Unlike Georgia, Texas excludes from its nominating petitions the signatures of qualified electors who are not registered to vote. Unlike Georgia, Texas requires that all signatures on nominating petitions be notarized, a cumbersome, time-consuming and expensive procedure at best. Finally, unlike Georgia, the Texas system is not an indisputably open one; any system that excludes from the ballot a viable national party candidate is certainly precariously close to being, if not "frozen" in the sense suggested by *Williams v. Rhodes*, at least thoroughly chilled.

The second defect in the Texas system is its plain and inescapable bias toward absolute political orthodoxy and major party hegemony, implicit in the requirement that a voter who has previously participated in a party primary election may not thereafter sign a minority party's nominating petition. Since Texas law does not permit minority parties to

collect signatures until the day *after* the major party primaries, it has discriminated against minority parties and independent candidates by providing the established parties with the first opportunity to secure an irrevocable commitment from the electorate, in violation of the Fourteenth Amendment's guarantee of equal protection of the law; and it has also, and perhaps more significantly, limited the individual voter's political participation to a choice between supporting all the nominees of an established political party or forsaking the primaries and supporting only minority party or Independent candidates. Thus, a voter in Texas could never support the nomination of both major party candidates and minority or Independent candidates during the same election year. Such a system, which limits the individual's political associations to one conglomerate of nominees, is inherently antithetical to the postulate of ideological heterodoxy implicit in the First Amendment.

The third constitutional flaw in the Texas scheme is its method for financing party primaries. Following this Court's decision in *Bullock v. Carter* the Texas Legislature enacted the McKool-Stroud Primary Financing Law of 1972, which provides a comprehensive financing plan for major political parties but which denies any financial assistance whatever to minority parties. While the Court in *Bullock v. Carter* did suggest very plainly that a State might make rational distinctions in implementing primary financing plans, it most assuredly did not imply that a State might simply exclude minority parties altogether. Such patently discriminatory tactics in the distribution of public funds is manifestly violative of the Equal Protection Clause, particularly because Texas, in its four stage convention scheme and notarization requirements demands that new or minority political parties expend substantial sums to achieve ballot certification.

Finally, the State of Texas has given established political parties an even greater advantage over small or newly formed parties by permitting absentee balloting for up to forty days preceding the primary elections, without providing any equivalent opportunity to minority parties or Independent candidates. In effect this advance vote provides the major parties with an even better chance to lure voters into an irrevocable decision before the available choices between nominees and

their positions on political issues have crystallized. The irony of this result is accentuated when it is remembered that the rationale given by the Three-Judge District Court to justify the prohibition against circulating nominating petitions until after the major party primaries was that, "if the petitions are circulated well in advance of the precinct conventions and primary elections, a voter may sign before another party's position has crystallized and the voter would be precluded from changing his mind." But that is precisely the consequence of the statutory requirements prohibiting minority parties from obtaining signatures on nominating petitions until after the major party primaries while granting major parties a three week head start in the race to commit support by allowing them to accept absentee votes in primary elections.

In Texas all political candidates are equal, but some are more equal than others.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court should should note probable jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Anthony Maness, a member of the Bar of the Supreme Court of the United States and the attorney for the Texas New Party, Texas Socialist Workers Party, et al., Appellants herein, hereby certify that on the 15th day of December, 1972, I have mailed three copies of the foregoing Jurisdictional Statement to opposing counsel at the following address: The Honorable Crawford Martin, Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711. I certify that all parties required to be served have been served.

MICHAEL ANTHONY MANESS